STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2010
v	No. 290259 Wayne Circuit Court
DEWAYNE MARQUIS BINYARD, Defendant-Appellant.	LC No. 08-004816-FC

Before: WILDER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.227f, and possession of a firearm during the commission of a felony, MCL 750.227b. This case arises out of a shooting that occurred on March 2, 2008, at Oscar's Coney Island in Detroit. One victim died of multiple gunshot wounds and the other victim sustained serious injuries from the gunshots. Defendant appeals his convictions and, for the reasons set forth below, we affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Defendant contends that he was denied the effective assistance of counsel because his trial attorney failed to present an alibi defense. This Court granted defendant's motion for a *Ginther*[1] hearing to develop a factual record regarding his ineffective assistance of counsel claim. The trial court conducted the hearing and, after considering the evidence presented, denied defendant's motion for a new trial. "We review the trial court's findings of fact at a *Ginther* hearing for clear error, and review questions of constitutional law de novo." *People v McCauley*, 287 Mich App 158, 162; 782 NW2d 520, 523 (2010). As this Court explained in *People v Petri*, 279 Mich App 407, 410-411; 760 NW2d 882, 885 (2008):

> Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. [*People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).] To succeed on a claim of ineffective assistance of counsel, the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

We hold that the trial court did not clearly err when it ruled that defendant failed to timely inform defense counsel about his alibi witnesses. On the third day of trial, defense counsel stated on the record that defendant told him that he wished to present three witnesses who would testify that defendant was not at the scene of the crime. Defense counsel informed the court that this was the first time defendant told him about the existence of the witnesses. Because the defense was required to give notice of an alibi defense in advance of trial, MCL 768.20(1), the trial court did not grant defense counsel additional time to pursue the matter. At the *Ginther* hearing, defense counsel reiterated that, until the third day of trial, defendant failed to inform him that he knew of three witnesses who could testify that he was elsewhere at the time of the shooting. Defendant testified to the contrary and maintained that he repeatedly told defense counsel about the three alibi witnesses.

Simply put, the trial judge found defense counsel's explanation more credible. Generally, "if resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, we will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000). We further note that, at the *Ginther* hearing, defendant failed to present the testimony of the alleged alibi witnesses. Defendant attached to his brief on appeal affidavits of two witnesses, both of whom asserted that defendant was at an address on Fairfield when the shootings occurred at Six Mile and Wyoming. Those affidavits were signed on April 24, 2009. However, at the *Ginther* hearing on November 20, 2009, defendant presented no evidence that the witnesses would support his alibi defense and, indeed, defendant's appellate attorney stated on the record that he spoke to two of the witnesses and he did not "believe that they would support the motion that is before the Court." In other words, when asked by counsel, two of the witnesses could not or would not provide testimony to support defendant's alibi. Defendant's appellate counsel further stated that, after many efforts, he was unable to contact the third witness to present any evidence to the trial court. Because defendant did not present this evidence in the trial court, we have no basis to review it on appeal but, more importantly, the trial court did not err when it concluded that defendant made no effort to bring the witnesses to defense counsel's attention until trial was well under way. Accordingly, the trial court correctly ruled that defense counsel did not provide ineffective assistance to defendant at trial.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence to show that he was the person who shot the two victims. "In challenges to the sufficiency of the evidence, this Court reviews the record evidence de novo in the light most favorable to the prosecution to determine

whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

Here, ample evidence supported the jury's verdict. Norris Elkins witnessed the shooting and testified at trial that he had "[n]o doubt" that defendant was the shooter. He further testified that, though he failed to initially identify defendant from a photographic array, he called the police department later the same day and stated that he believed the perpetrator was pictured in the first numbered photo, which was a photo of defendant. Again, however, Mr. Elkins made a positive, unequivocal identification of defendant in the trial court. Myron Logan was also at the scene of the crime. According to homicide investigator Donald Olson, Mr. Logan immediately identified defendant as the shooter when he viewed the photo array. Mr. Logan acknowledged at trial that he picked defendant out of the photographs and the array shows that he placed his initials on defendant's photo when he made the identification. Though Mr. Logan testified at trial that he is on medication for a mental illness and has memory problems, Officer Olsen testified that, when Mr. Logan identified defendant on the day of the crime, it did not appear that he was on drugs or had any mental problems.

Other evidence also supported defendant's conviction. Mr. Elkins testified that, after the shooting, defendant walked out of the Coney Island and got into a red Mercury Sable. In an attempt to stop defendant, Mr. Elkins rammed the Sable with his own vehicle. Defendant fled on foot, leaving behind the .44 Magnum revolver that ballistics tests confirmed was used in the shooting. It is undisputed that defendant's girlfriend was the owner of the red Mercury Sable found at the scene of the shooting and photographs show the body damage caused by Mr. Elkins's attempts to stop defendant from fleeing the scene.

Beverly Lane, the mother of defendant's girlfriend, testified that, shortly after the shooting, defendant woke her up and asked to use her car. Ms. Lane assumed defendant had damaged her daughter's car and she overheard defendant say that he had an altercation with some men at the Coney Island. Lawrence Works lived in the same house with Ms. Lane and defendant's girlfriend. He testified that, on the morning of the incident, defendant told him he had a confrontation with some men and he asked for a gun. Mr. Works testified that he gave defendant a .44 Magnum revolver and defendant left with it. Defendant returned a half hour to an hour later and used Mr. Works's cellular phone to ask someone to pick him up. Mr. Works further acknowledged that he heard defendant tell his girlfriend that she should report that her car was stolen. Defendant's girlfriend testified at trial that defendant went to the Coney Island around the time of the shooting and that he drove her red Sable. Though she denied it at trial, defendant's girlfriend testified under an investigative subpoena that she heard defendant say that he shot some men and that defendant asked her to report her car stolen.

The above evidence is clearly sufficient to support the jury's verdict. However, defendant attached three affidavits to his brief on appeal, signed by Ms. Lane, Mr. Works, and defendant's girlfriend, containing various factual assertions that conflict with or recant their previous trial testimony. Because these were not made part of the record in the trial court, either through a motion for a new trial or a motion for relief from judgment, we will not consider them on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). In any case, even excluding the testimony of the three witnesses, defendant was positively identified as the shooter and other circumstantial evidence linked him to the crime.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Henry William Saad